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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JACKIE EDWARD JOHNSON, Defendant and Appellant.	C085283 (Super. Ct. No. 16FE014655)

Defendant Jackie Edward Johnson got into an argument and physical fight with his girlfriend J.H. J.H. picked up their three-month-old son during the fight that continued until the baby appeared to lose consciousness. Defendant and J.H. failed to timely seek medical care for their injured son and he sustained irreversible brain damage. A jury found defendant guilty of two counts of felony child endangerment (Pen. Code, § 273a,

subd. (a))[1] and corporal injury on a cohabitant (§ 273.5, subd. (a)). The jury found true the allegation of personal infliction of great bodily injury (GBI) on the first count of child endangerment. (§ 122022.7, subd. (d).) The trial court found true allegations that defendant had a serious prior felony (§§ 667, subd. (a), (b)-(i), 1170.12) and had served a prior prison term (§ 667.5, subd. (b)). The court sentenced defendant to 25 years and 8 months in prison.

On appeal, defendant contends the trial court abused its discretion in denying his five motions to replace counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. He further contends there was insufficient evidence he personally inflicted GBI on the baby; it was prejudicial error to give an instruction on group assault and to fail to instruct on the lesser charge of misdemeanor child endangerment; and the two counts of child endangerment comprise a continuous course of conduct for which there can be only one conviction. We reject these contentions and affirm the judgment.

In a supplemental brief, defendant contends the matter must be remanded to the trial court for the exercise of discretion to strike the five-year prior under newly enacted Senate Bill No. 1393. We agree and remand for that limited purpose.

FACTS

Defendant and J.H. had a son who was born premature at 32 weeks, weighing three pounds. The baby had marijuana in his system at birth.

On May 4, 2016, defendant and J.H. had been evicted from their apartment and were living in a motel. J.H. missed a call from defendant while she was outside the motel room meeting a man to purchase marijuana. When defendant returned to the motel, he was angry about J.H. being with the other man. What began as an argument and name calling escalated into a physical fight; J.H. picked up the baby after the fight began and

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[1] Further undesignated statutory references are to the Penal Code.

defendant punched her repeatedly as she held the baby. During the fight, defendant also tried to grab the baby. The fight continued until defendant and J.H. noticed the baby was losing consciousness; his eyes were fluttering, and he was no longer responsive. The baby's eyes rolled back in his head and when J.H. tried to feed him, he vomited. J.H. sprinkled water on the baby's face to try to revive him.

The parents aborted a trip to the emergency room when they decided the baby appeared normal and returned to the motel. The baby would not sleep and cried all night. Defendant told a detective that the reason he did not go to the hospital was because he had a warrant. He also said they waited to go to the hospital because they did not know what they would say when they got there.

The next morning J.H. called her sister Dolly Belle and asked to be picked up. J.H. told her sister about the fight. When Belle picked up J.H. and the baby, the baby needed to be changed and had thrown up; his arm was twitching. Belle told J.H. to take the baby to the hospital. J.H. waited until her friend Brianna Wilson could take her to the hospital with the baby. At the hospital, J.H. said the baby may have been hurt when she accidentally sat on him or that his ears needed to be checked because he had heard a loud argument. She did not tell the medical staff the entirety of his symptoms and omitted key information. The hospital discharged the baby. J.H. left him with her sisters and went clubbing with Wilson that night.

For the next two days the baby was cared for by J.H.'s sisters Belle and Bernice McClain. The baby was fussy, vomiting, and twitching. The baby got worse and the sisters tried to reach J.H. but got no response. By May 7, the baby's twitching was worse; his eyes were rolling back, and he threw up after eating. Belle suspected the baby was having seizures. McClain called and spoke with defendant; she told him they needed to come get the baby and take him to the hospital. Defendant said he and J.H. were sleeping and would come later. Later, Belle FaceTimed J.H. to show her the baby was having a seizure. J.H. and defendant did not react with any emotion. Belle called 911.

At the hospital, a protective hold was placed on the baby. J.H. was arrested that night at the hospital. Defendant did not go in the hospital, but instead sent in a friend pretending to be him. He was arrested in August.

At trial, J.H. testified under a grant of immunity. She denied she ever told anyone that defendant hit her while she was holding the baby. She denied she used the baby as a shield. The conditional examination conducted by Patricia Holden, a CPS investigator, was played for the jury. Holden was unavailable at trial due to recent childbirth. She had interviewed J.H. who had said the baby likely sustained injuries during the fight when defendant punched her repeatedly as she held the baby. Defendant was acting as his own attorney during this conditional examination.

At trial the People played portions of defendant's phone calls with J.H. while he was in jail. In the calls, defendant berated J.H. for telling others about their fight and called her a "snitch." He told J.H. they were both at fault and the baby would not have been hurt had she not picked him up; he accused her of putting the baby in harm's way.

Julia Magana, a pediatric emergency medicine physician, testified about abusive head trauma, a condition previously referred to as shaken baby syndrome. The typical symptoms of abusive head trauma are fussiness, not eating, vomiting, a high-pitched cry, irritability, sleepiness, seizures, and loss of consciousness. Dr. Magana spoke with the baby's aunts who described the baby's symptoms; his symptoms were classic for abusive head trauma. CT scans and an MRI of the baby's brain showed several areas of bloody injury, areas without oxygen, and multiple subdural hematomas on both sides of the head. Dr. Magana explained that black spots on the MRI were cells that were dying or dead; they would not heal.

The prosecutor presented Dr. Magana with a hypothetical wherein the parents are arguing, and the mother picks up the baby while father is hitting her. The father pushes the mother on to the bed while the baby is in mother's arms and he tries to grab the mother's arms. The mother is holding the baby as she hits and kicks the father who is

hitting the mother and grabbing at her arms. Dr. Magana testified that scenario was the textbook way abusive head trauma occurs. The key is a whiplash motion, accelerations and deceleration where the child's brain shakes inside the skull. Dr. Magana testified abusive head trauma could occur if the baby's body is stabilized and the baby's head was jerking back and forth.

By the summer of 2016, the baby had been hospitalized for seizures and was on preventative medication. The long-term effects of the baby's injuries were not yet known. With moderate to severe abusive head trauma, 65 to 75 percent of children develop some form of cerebral palsy or developmental delay and have learning and behavioral problems. The baby was receiving intensive therapy--physical, speech, and occupational--on a regular basis. He was behind on his developmental milestones and was not using his right arm as much as his left. As one example of his developmental delay, he did not sit up on his own until he was 14 months old; babies normally sit up at about six months.

DISCUSSION

I

Denial of Marsden *Motions*

Defendant contends the trial court abused its discretion in denying his five *Marsden* motions. He contends his extreme dissatisfaction with and loss of trust in his appointed counsel established an irreconcilable conflict.

A. *Background*

Defendant's first *Marsden* motion was December 6, 2016, months before the trial commenced in May 2017. Defendant complained counsel was not doing anything he requested. He wanted to challenge the lack of *Miranda* warnings (*Miranda v. Arizona* (1966) 384 U.S. 436), the presence of a witness at the preliminary hearing during another's testimony, the lack of a speedy trial, and his strike prior. He complained that

the district attorney added charges after the preliminary hearing and that counsel had seen him only once.

The trial court explained that the *Miranda* motion could be filed only in the trial court and the district attorney could file additional charges after the preliminary hearing. Counsel explained defendant believed he was entitled to trial 60 days after arrest, but that this was not the law. Defendant originally was charged only with felony child abuse and no strike; counsel recommended he plead to the sheet. Defendant wanted to plead to misdemeanor child abuse, but counsel explained that such a reduction was unlikely because the baby had irreparable brain damage. Counsel had visited defendant four times. Defendant insisted on testifying at the preliminary hearing and his testimony hurt his case. He claimed he was not worried about the strike because it was 10 years old; counsel told him he was mistaken not to worry, but defendant did not agree with her. Counsel indicated a motion to dismiss the strike is made at sentencing. The court told defendant to stop making phone calls and that it was "suicide" to testify at a preliminary hearing. The court advised defendant to listen to his attorney and denied the motion.

At the end of December, defendant moved to represent himself. The trial court granted the motion. Defendant represented himself during the conditional examination of Holden, a CPS worker who had interviewed J.H. He also filed a number of motions that the court denied. Trial counsel was reappointed.

In April 2017, defendant filed another *Marsden* motion, claiming counsel had done "nothin[g]" and lied about the evidence. Defendant was concerned that counsel was not bringing up the testimony of Dr. Vickers, who had said the baby's injury was caused by slamming or shaking the baby; defendant claimed he never had the baby in his arms. He again raised the issue of the witness at the preliminary hearing. Counsel explained she had twice been to see defendant and he refused to see her. She had been able to obtain an expert, Dr. Crawford. The trial court commented that was "a coup." The court explained to defendant that the prosecutor would call Dr. Vickers if her testimony was

favorable to the prosecution and counsel could cross-examine her. Defendant's counsel would call Dr. Crawford if his testimony was favorable. The court explained that the presence of the witness at the preliminary hearing during another's testimony could be handled through cross-examination.

Defendant again refused an offer of eight years. The trial court denied the *Marsden* motion.

Just before trial defendant made a third *Marsden* motion, claiming his attorney was in "cahoots" with the district attorney. He again objected to addition of charges after the preliminary hearing and the witness being present at that hearing. He complained that his attorney would not call Dr. Vickers and the district attorney was not calling her either. Counsel explained that defendant's damaging testimony at the preliminary hearing about the condition of the baby during the fight and his failure to take the baby to the hospital because he was concerned about his warrants had harmed his case and negated any defense that the aunts caused the baby's injuries. She explained the reason she was calling Dr. Crawford instead of Dr. Vickers was because she believed he was an expert with "an impeccable record" who would do a better job.

The trial court noted the problems defendant cited were due to the facts of the case and defendant's testimony at the preliminary hearing; it denied the motion.

A week later defendant requested another *Marsden* hearing, bringing up the issue of the medical expert. The trial court noted defendant had raised the same issue the week before and denied the motion.

During J.H.'s testimony defendant made his fifth *Marsden* motion. He complained counsel did not care about "winning" and had told him that he had caused his son's brain damage. She would not call Dr. Vickers as a witness. Defendant said counsel was on the prosecution's side and he was not getting a fair trial. Counsel explained that every time she went to see defendant he swore at her. The trial court told defendant he was making himself a difficult client; he could not create the problem and

then complain about it. Defendant asked how the court knew that it was he who was lying, not counsel. The court responded it had seen enough of defendant's conduct to evaluate his credibility.

B. *Law and Analysis*

"Under the Sixth Amendment right to assistance of counsel ' " '[a] defendant is entitled to [substitute another appointed attorney] if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.' " ' [Citation.]" (*People v. Welch* (1999) 20 Cal.4th 701, 728.) When a defendant makes a *Marsden* motion to substitute appointed counsel, "the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance. A defendant is entitled to relief if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. Substitution of counsel lies within the court's discretion. The court does not abuse its discretion in denying the motion unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of counsel." (*People v. Smith* (2003) 30 Cal.4th 581, 604.)

We find no error in denying defendant's many motions for substitute counsel. The trial court allowed defendant to state his complaints fully, then carefully inquired into each of them, eliciting a point by point response from defense counsel. Further, the court explained to defendant that some of his complaints were based on a misunderstanding of the law, such as when the prosecution could add charges or when motions could be filed. Many of defendant's complaints involved trial tactics, such as what motions to file and what witnesses to call. "A defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense. [Citation.]

Tactical disagreements between the defendant and his attorney do not by themselves constitute an 'irreconcilable conflict.' 'When a defendant chooses to be represented by professional counsel, that counsel is "captain of the ship" and can make all but a few fundamental decisions for the defendant.' [Citation.]" (*People v. Welch, supra,* 20 Cal.4th at pp. 728-729.)

As the trial court explained to defendant, his frustration with counsel was largely due to the facts of the case and decisions that defendant had made that were challenging to his defense. While trust is a component of an effective attorney-client relationship, defendant's alleged loss of trust in counsel was based on his unfounded belief that counsel was "in cahoots" with the prosecution. "In determining whether defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result, trial courts properly recognize that if a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment and by a process of elimination could obtain appointment of their preferred attorneys, which is certainly not the law. A trial court is not required to conclude that an irreconcilable conflict exists if the defendant has not made a sustained good faith effort to work out any disagreements with counsel and has not given counsel a fair opportunity to demonstrate trustworthiness." (*People v. Crandell* (1988) 46 Cal.3d 833, 859-860 overruled on another point by *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.) Further, defendant's difficulties with counsel were largely due to his own behavior. "[A] defendant may not force the substitution of counsel by his own conduct that manufactures a conflict." (*People v. Smith* (1993) 6 Cal.4th 684, 697.) "To the extent there was a credibility question between defendant and counsel at the hearing, the court was 'entitled to accept counsel's explanation.' " (*Id.* at p. 696.)

II

Sufficiency of the Evidence on the Enhancement

Defendant contends there is insufficient evidence that he personally inflicted GBI on the baby. He argues there is no evidence he touched the baby or directly applied force to him during the fight with J.H.

A challenge to the sufficiency of the evidence supporting the jury's true finding on a GBI enhancement (§ 12022.7) is governed by the substantial evidence standard of review (*People v. Escobar* (1992) 3 Cal.4th 740, 750). "To assess the evidence's sufficiency, we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Section 12022.7, subdivision (d) provides in part that: "Any person who personally inflicts [GBI] on a child under the age of five years in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment." " '[T]he meaning of the statutory requirement that the defendant personally inflict the injury does not differ from its nonlegal meaning. Commonly understood, the phrase "personally inflicts" means that someone "in person" [citation], that is, directly and not through an intermediary, "cause[s] something (damaging or painful) to be endured" [citation].' [Citation.]" (*People v. Martinez* (2014) 226 Cal.App.4th 1169, 1184.) "[T]he enhancement applies only to a person who himself inflicts the injury." (*People v. Cole* (1982) 31 Cal.3d 568, 572.)

There was ample evidence that defendant personally inflicted GBI on the baby during his fight with J.H. Dr. Magana testified abusive head trauma could occur if the baby's body was stabilized but his head was jerking. The necessary movement was a whiplash, acceleration and deceleration that shook the baby's head. The testimony established that such movement occurred while J.H. was holding the baby and defendant was hitting her repeatedly. J.H. told her sisters that defendant tried to grab the baby during the fight. She told her friend that defendant grabbed, shook, and hit her while the baby was in her arms.

Defendant contends he did not "personally inflict" GBI on the baby because there was no definitive evidence that he actually *hit the baby*. However, there was substantial evidence that he was "the person who directly acted to cause the injury." (*People v. Cole, supra,* 31 Cal.3d at p. 572.) It was defendant's continued attack on J.H. while she held the baby that directly caused the injury. As defendant recognized in his jail phone call with J.H., during the fight the baby was "in harm's way." Defendant was the one who created the harm; his force against J.H. while she was holding the baby was force against the baby.

That J.H. also bore responsibility for the injury to the baby does not exonerate defendant. "More than one person may be found to have directly participated in inflicting a single injury." (*People v. Guzman* (2000) 77 Cal.App.4th 761, 764.) In *Guzman*, defendant was under the influence of alcohol when he made an unsafe left turn into oncoming traffic, causing a collision that injured his passenger. Defendant's "volitional act was the direct cause of the collision and therefore was the direct cause of the injury." (*Ibid.*) As the *Guzman* court noted, "in *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1210-1211, the defendant who held the victim while a codefendant struck her was found directly responsible for the injury the victim suffered when she fell while pulling away." (*Guzman*, at p. 764.)

III

Group Assault Instruction

The trial court instructed the jury that as to the child endangerment charges, J.H. was an accomplice. The defense argued she was "just as guilty for what happened" to the baby as defendant. Because J.H. was also responsible for the injuries to the baby, the trial court instructed the jury on group assault pursuant to CALCRIM No. 3162. Defendant contends the court prejudicially erred in giving this instruction because it did not apply. He repeats his argument that he did not personally inflict GBI because he had no direct contact with the baby and further argues there was no group assault.

The court instructed the jury as follows: "If you conclude that more than one person assaulted [the baby] and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted [GBI] on [the baby] if the People have proved that: [¶] One. Two or more people, acting at the same time, assaulted [the baby] and inflicted [GBI] on him. [¶] Two. The defendant personally used physical force on [the baby] during the group assault. [¶] And three. The physical force that the defendant used on [the baby] was sufficient in combination with the force used by the other person to cause [the baby] to suffer [GBI]. [¶] The Defendant must have applied substantial force to [the baby]. If that force could not have caused or contributed to the [GBI], then it was not substantial. [¶] The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved."

Defendant did not object to the instruction at trial. Because he contends his substantial rights to due process and a fair trial were affected, an objection was not required to preserve the issue for appeal. (§ 1259.)

Preliminarily, we agree that this is not a "typical" group assault case, where a group of people attacks a victim or victims. (See *People v. Modiri* (2006) 39 Cal.4th 481 [defendant joined group attack at party].) However, this *is* a case where the actions of

two people combined to cause GBI to the victim. Neither defendant nor J.H. *directly* attacked the baby. But although their fight was with each other, their actions combined to cause GBI to the baby.

In *Modiri,* our Supreme Court held CALJIC No. 17.20, the predecessor to CALCRIM No. 3162, adequately conveyed the statutory principles for personally inflicting GBI. "[T]he statute calls for the defendant to administer a blow or other force to the victim, for the defendant to do so directly rather than through an intermediary, and for the victim to suffer [GBI] as a result." (*People v. Modiri, supra,* 39 Cal.4th at p. 493.) A personal-infliction finding may be upheld "where the physical force the defendant and other persons applied to the victim at the same time combined to cause great bodily harm." (*Id.* at p. 496.) The group assault instruction permitted the jury to find personal infliction of GBI where the baby's injuries were due to the combined actions of defendant and J.H. There was no error in giving the instruction.

IV

Continuous Course of Conduct

Defendant contends he could not be convicted of both counts one and two because the two counts comprise a single continuous course of conduct that will support only one conviction. He argues that child endangerment is a continuous course of conduct crime and the course of conduct cannot be separated into distinct acts for multiple convictions. He relies on *People v. Avina* (1993) 14 Cal.App.4th 1303 at page 1311, a case involving continuous sexual abuse of child (§ 288.5).

The amended information alleged count one as occurring on May 4, 2016. The prosecutor argued that count covered the physical fight during which the baby was injured. Count two covered May 4 and May 5; the prosecutor argued this charge was child endangerment for not securing appropriate medical care for the baby the night he was injured.

Child endangerment is not *always* an indivisible continuous course of conduct crime. While it often covers repetitive or continuous conduct, the child abuse statute may be violated by a single act. (*People v. Ewing* (1977) 72 Cal.App.3d 714, 717.)

"An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts . . . ." (§ 954.) Further, "the defendant may be convicted of any number of the offenses charged." (*Ibid.*) Multiple convictions are allowed for crimes that do not monetize and aggregate harm or damage; "a defendant may be convicted of multiple crimes—even if the crimes are part of the same impulse, intention or plan—as long as each conviction reflects a completed criminal act." (*People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1518.) This rule has been applied, for example, to convictions for corporal injury on a spouse. (*People v. Johnson* (2007) 150 Cal.App.4th 1467, 1477.)

Here, there were two distinct crimes of child endangerment. First, the baby was seriously injured when defendant punched, grabbed, and shook J.H. while she held the baby. This was a continuous course of conduct crime; defendant was not separately charged for each individual blow. Later, a second crime occurred when defendant failed to take the baby to the hospital for medical care. Defendant originally refused to take the baby to the hospital despite the baby's serious symptoms. Later, J.H. convinced him to go, but they aborted the trip because they unilaterally decided that the baby was fine. There was evidence that the real reason defendant did not take the baby to the hospital was to avoid the authorities. He told a detective he did not want to go to the hospital because he had a warrant; he also said that he and J.H. waited to go to the hospital because they did not know what to say about the origin of the baby's injuries. Thus, the two crimes involved different actions and intents, subjected the baby to separate risks, and occurred at different times.

People v. Braz (1997) 57 Cal.App.4th 1 addressed the issue of multiple punishment under similar facts.[2] In *Braz*, defendant was convicted of and sentenced for two counts of child endangerment, one for her participation in the beating of her son and the second for her failure to obtain medical aid for him. (*Id*. at p. 9.) In upholding punishment for each count, the appellate court found two separate theories of liability. The second count posed a separate and distinct harm to the child, as he could have been saved with prompt medical attention and the failure to obtain prompt aid was perhaps to avoid detection. "As appellant argues, there must be some separation between the infliction of injury on a child and the failure to call for medical help, or every blow would lead to a separate count for failing to come to the child's assistance. However, the failure to obtain help following an injury of this severity, inferentially to avoid detection of the initial crime, is a separate criminal objective." (*Id.* at pp. 11-12.) Although the issue in *Braz* is different than the issue here, its analysis of the separate nature of the two crimes of child endangerment supports our conclusion that counts one and two were not part of an indivisible course of conduct comprising a single crime but instead were distinct crimes.

V

Failure to Instruct on Misdemeanor Child Endangerment

Defendant contends the trial court prejudicially erred in failing to instruct on the lesser included offense of misdemeanor child endangerment. He contends there was evidence from which the jury could have found the circumstances of child endangerment were not likely to produce great bodily harm.

Felony child endangerment occurs "under circumstances or conditions likely to produce great bodily harm or death." (§ 273a, subd. (a).) Misdemeanor child

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[2] Defendant does not challenge his separate sentence on count two.

endangerment occurs "under circumstances or conditions other than those likely to produce great bodily harm or death." (§ 273a, subd. (b).) Misdemeanor child endangerment is a lesser included offense of felony child endangerment. (*People v. Sheffield* (1985) 168 Cal.App.3d 158, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470.)

" ' "It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." [Citation.] That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.]' " (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

"A trial court must instruct on a lesser included offense if there is substantial evidence from which a reasonable jury could conclude the defendant is guilty of the lesser offense, but not the charged offense. [Citation.] 'In deciding whether evidence is "substantial" in this context, a court determines only its bare legal sufficiency, not its weight.' [Citation.]" (*People v. Racy* (2007) 148 Cal.App.4th 1327, 1335.)

"The distinction between felony and misdemeanor child endangerment depends on whether the acts or omissions involved circumstances or conditions likely to produce great bodily injury or death to the child (if so, felony—§ 273a, subd. (a); if not, misdemeanor—§ 273a, subd. (b))." (*People v. Burton* (2006) 143 Cal.App.4th 447, 454, fn. 4.) Defendant argues the jury could have found count one to be a misdemeanor, despite the serious injury to the baby, by finding "the injury was an unexpected, unforeseen, unlikely accident and that situation was unlikely to result in great bodily harm." This argument fails to persuade. Defendant continued to hit J.H. after she picked

up the baby, while the baby was crying. Defendant grabbed at the baby and there was evidence he shook both J.H. and the baby. There was no evidence that defendant's actions during the fight were less than likely to produce great bodily harm to a small baby.

As to count two, defendant argues the jury could have concluded the injury to the baby was complete when the fight stopped and the delay in seeking medical aid was not likely to produce any additional harm. This argument ignores the nature of the baby's injuries, which presented immediately as sufficiently serious to stop his parents' fighting. He was losing consciousness; his eyes rolled back in his head and he was nonresponsive. When J.H. tried to feed him, he vomited. In these circumstances, any reasonable person would have understood that he needed immediate medical attention. While J.H. claimed they aborted their trip to the hospital when the baby appeared normal, any belief the baby was fine was dispelled when the baby later cried all night. Dr. Magana testified that because the baby did not receive prompt appropriate treatment, his symptoms became more severe.

In short, both instances of child endangerment occurred under circumstances likely to produce great bodily harm and there was no evidence from which the jury could conclude otherwise. There was no error in failing to instruct on misdemeanor child endangerment.

VI

Senate Bill No. 1393

In a supplemental brief defendant contends this case must be remanded to the trial court to exercise its discretion to strike the five-year prior enhancement (§ 667, subd. (a)) as now permitted by Senate Bill No. 1393. We agree.

On September 30, 2018, the Governor signed Senate Bill No. 1393 which, effective January 1, 2019, amended sections 667, subdivision (a) and 1385, subdivision (b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony

conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the now former versions of these statutes, the court was required to impose a five-year consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony" (§ 667, subd. (a)), and the court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (§ 1385, subd. (b).)

Defendant contends the statutory changes of Senate Bill No. 1393 apply retroactively to any case that is not final on January 1, 2019, under the rule of *In re Estrada* (1965) 63 Cal.2d 740. "The *Estrad*a rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not." (*People v. Conley* (2016) 63 Cal.4th 646, 657.)

The same inference of retroactivity applies when an amendment ameliorates the possible punishment. (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 308.) When a statutory amendment " 'vests in the trial court discretion to impose either the same penalty as under the former law or a lesser penalty,' " there is "an inference that the Legislature intended retroactive application 'because the Legislature has determined that the former penalty provisions may have been too severe in some cases and that the sentencing judge should be given wider latitude in tailoring the sentence to fit the particular circumstances.' " (*Ibid.*, quoting *People v. Francis* (1969) 71 Cal.2d 66, 76.)

Under the *Estrada* rule, as applied in *Francis and Lara,* we infer as a matter of statutory construction, that the Legislature intended Senate Bill No. 1393 to apply to all cases not yet final on January 1, 2019. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) The People agree that Senate Bill No. 1393 is retroactive to cases, like defendant's, that are not yet final. The People contend, however, that remand is not warranted in this

case because the trial court made clear that it would not have stricken the five-year enhancement.

"We begin by discussing the general standard for assessing when a remand is required for a trial court to exercise sentencing discretion. '[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to "sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court," and a court that is unaware of its discretionary authority cannot exercise its informed discretion.' [Citation.] But if ' "the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required." ' [Citation.]" (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.)

In arguing against remand, the People rely on the trial court's denial of two motions that would have reduced his sentence. The court denied defendant's *Romero* motion (*People v. Superior Court (Romero)* (1966) 13 Cal.4th 497) to dismiss his strike, citing his extensive criminal record, and his motion under section 17, subdivision (b) to reduce his domestic violence conviction to a misdemeanor. Further, the court imposed the upper term on count one.

This is not, however, a case where the trial court imposed the maximum possible sentence or indicated it would not exercise its discretion to lessen defendant's sentence in any way. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.) Rather, the court imposed the mid-term on the great bodily injury enhancement and ran the sentence on domestic violence conviction concurrent; "That won't be additional time." The court noted defendant had some good qualities and did not intend the injuries to his son.

In these circumstances, the record is not clear that the trial court would not have exercised its discretion to dismiss the enhancement. Accordingly, we remand the matter

to the trial court for the exercise of discretion regarding dismissal of the section 667, subdivision (a) enhancement.

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court for the exercise of discretion to dismiss the five-year enhancement of section 667, subdivision (a).

/s/
Duarte, J.

We concur:

/s/
Butz, Acting P. J.

/s/
Hoch, J.